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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Implementation of Section 302 of
the Telecommunications Act of 1996

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MM Docket No. 96-46

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REPLY COMMENTS OF VIACOM INC.

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REPLY COMMENTS OF VIACOM INC.

Viacom Inc. ("Viacom") hereby submits its reply to comments filed in connection with the Commission's Notice of Proposed Rulemaking ("Notice") in the above-captioned proceeding.¹ As noted below, the record compiled in this docket confirms the fundamental premise of Viacom's original comments: the Commission must take a light hand in crafting the regulatory framework for "Open Video Systems" ("OVS") if the video marketplace is ever to experience the substantial competitive benefits of OVS envisioned by Congress in the Telecommunications Act of 1996 (the "1996 Act").² Open Video Systems' singular potential for offering both inter-system and intra-system competition will come to nothing unless the Commission's implementing regulations -- while providing the minimum safeguards needed to afford unaffiliated packagers fair access to and treatment on an Open Video System -- still

¹ Report and Order and Notice of Proposed Rulemaking, CS Docket No. 96-46, FCC 96-99 (released March 11, 1996).

² See Comments of Viacom Inc., CS Docket No. 96-46 (filed Apr. 1, 1996) ("Viacom Comments"). Congress provided for Open Video Systems in Section 302 of the 1996 Act, Pub. L. No. 104-104, 110 Stat. 56 (approved February 8, 1996).

permit a viable OVS-affiliated program packager to emerge.³ This brief submission urges the Commission to proceed accordingly and readdresses only those issues that warrant further comment.

**I. The Record Highlights The Risk Of Denying Operators
Of Open Video Systems Reasonable Flexibility**

Local exchange carrier ("LEC") commenters have stated quite credibly that Open Video Systems will not emerge in the video marketplace if an OVS operator is prevented from mounting vigorous competition to inter-system rivals.⁴ As a programmer, Viacom is keenly interested in making full use of all possible forms of distribution methods to deliver its program content to subscribers. Yet to insist on securing the most strictly conceived notion of "open" access imaginable for OVS would be ultimately self-defeating.

Viacom thus continues to advocate adoption of OVS rules that consist of general prescriptive requirements for non-discriminatory treatment of unaffiliated packagers, supplemented with "safe harbor" examples of practices deemed presumptively fair and reasonable.⁵ This approach is best suited to fostering the establishment and growth of a new

³ As in Viacom's initial comments in this proceeding, the term "packager" or "program packager" refers to any entity which seeks to provide programming on a retail basis to subscribers through an Open Video System regardless of whether that packager offers only one program service or a collection of several services. The term "programmer" means the entity that licenses program material to a packager.

⁴ See, e.g., Joint Comments of Bell Atlantic, et al., CS Docket No. 96-46, at 1-6 (filed Apr. 1, 1996) ("Joint LEC Comments"); Comments of U S West, Inc., CS Docket No. 96-46, at 2-3 (filed Apr. 1, 1996) ("U S West Comments") (both noting other options for entry now open to LECs, including traditional cable service).

⁵ Viacom Comments at 7-14.

regulatory creature such as OVS, because the approach allows for reasonable flexibility in system design while also providing the regulatory certainty needed to encourage system investment.

II. The Record Underscores The Need For OVS Allocation Requirements That Allow For A Viable Operator-Affiliated Package While Affording Non-Affiliated Packagers Fair Access To The System

Nothing in the record refutes the premise underlying Viacom's call for minimally intrusive rules for affording unaffiliated packagers fair access to Open Video Systems.⁶ To the contrary, potential OVS operators have acknowledged that they will have no incentive to undertake the investment needed for (or cope with the uncertainty inherent in) the launch of Open Video Systems if they themselves are precluded by government regulation from becoming strong rivals to other multichannel video distributors.⁷

The Commission therefore should give OVS-affiliated packagers reasonably broad latitude to put together program packages that will appeal to subscribers.⁸ The OVS operator must be permitted, as the 1996 Act specifies, to take at least one-third of the

⁶ Id.

⁷ See Joint LEC Comments at 11-13; Comments of NYNEX Corporation, CS Docket No. 96-46, at 35 (filed Apr. 1, 1996) ("NYNEX Comments"); U S WEST Comments at 11-14.

⁸ Accord, e.g., Joint LEC Comments at 16-18, 21-22; U S WEST Comments at 10-17. This latitude would include permitting an OVS-affiliated packager to "co-package" with the program service offerings selected by an unaffiliated packager, subject to the contractual authorization by affected programmers for the distribution of their services.

capacity on its system for its affiliated packager's use -- and, if demand from unaffiliated packagers does not outstrip supply, to take additional capacity as well.⁹ And as Viacom and other commenters have pointed out, neither OVS packagers nor subscribers would be well served by a rule requiring packagers carried on a particular system to relinquish capacity if subsequent demand for channels should arise.¹⁰ Furthermore, there is no statutory mandate for, nor practical benefit in, requiring the OVS operator to provide more channel capacity to any one unaffiliated packager than it may allocate to its affiliated packager.¹¹ Nor is it necessary or desirable to count any "shared" channels, including those to which the OVS-affiliated packager has licensing rights, against the statutory cap on the affiliated packager's use of system capacity.¹²

The flexible allocation measures advocated in the preceding paragraph would not unfairly hobble an unaffiliated packager's ability to reach subscribers. The same cannot be said, however, of the suggestion that an OVS operator should have unfettered freedom to allocate all of a system's analog capacity to its affiliated packager (or any other favored packager) while offering only digital capacity to disfavored packagers who request analog

⁹ Viacom Comments at 11 (noting that principle should apply to both initial enrollment period and any subsequent enrollment periods).

¹⁰ See, e.g., Viacom Comments at 11; Comments of MFS Communications Company, Inc., CS Docket No. 96-46, at 22-23 (filed Apr. 1, 1996) ("MFS Comments"); NYNEX Comments at 8-9; U S WEST Comments at 11-12.

¹¹ Accord, e.g., Joint LEC Comments at 18; U S WEST Comments at 13-14; NYNEX Comments at 10-12.

¹² Accord, e.g., U S WEST Comments at 16.

channels. The record in this proceeding, as well as the voluminous record in the "video dialtone" ("VDT") proceeding before it, demonstrates that programming carried on digital channels in today's video marketplace is not nearly as accessible to subscribers as programming carried on analog channels.¹³ Consequently, at least until consumers come to enjoy ready access to programming carried on digital channels, the statutory cap should indeed be deemed to limit the OVS operator's affiliated packager to one-third of an over-subscribed system's analog capacity, measured separately from digital capacity.

III. The Record Supports Permitting Local Cable Operators To Become OVS Operators, But the 1996 Act's "Two-Wire" Model Would Not Be Served By Allowing A Local Cable Operator To Take Up Scarce Capacity On A Competitor's Open Video System

Viacom's initial comments explained that the public interest benefits of Open Video Systems are particularly well matched to the Congressional policy favoring a vigorously competitive "two-wire" world.¹⁴ Because OVS clearly could contribute to both inter- and intra-system competition, many commenters joined Viacom in supporting the Commission's proposal to allow any interested entity -- including an incumbent cable operator -- to offer

¹³ See, e.g., Comments of Home Box Office, CS Docket No. 96-46, at 4-7 (filed Apr. 1, 1996) ("HBO Comments"); accord U S WEST Comments at 10 (noting experience with Omaha VDT system, where analog channels were over-subscribed but digital capacity was "barely used").

¹⁴ Viacom Comments at 4.

video services under the OVS rules.¹⁵ Conversion from traditional cable service to OVS service would offer significant benefits to consumers and programmers alike, and cable operators should not be impeded by federal or local authorities from doing so.¹⁶

The policy goal of two-wire competition would not be advanced, however, if a local cable operator were permitted to use up scarce channel capacity on an Open Video System.¹⁷ Rather, the Commission itself should bar an incumbent cable operator from taking capacity on a competing LEC's Open Video System,¹⁸ at least in cases where demand for analog capacity exceeds supply.¹⁹ This issue could be revisited once digital capacity offers subscriber access generally comparable to that of analog and thereby renders the local cable operator's presence on an Open Video System less of an impediment to competition.

¹⁵ See, e.g., Joint LEC Comments at 29; Comments of Continental Cablevision, Inc., CS Docket 96-46, at 9-10 (filed Apr. 1, 1996); Comments of Time Warner Cable, CS Docket 96-46, at 26-27 (filed Apr. 1, 1996); Comments of the Motion Picture Association of America, Inc., CS Docket No. 96-46, at 11-12 (filed Apr. 1, 1996) ("MPAA Comments").

¹⁶ Contra Joint Comments of National League of Cities, et al., CS Docket No. 96-46, at 46-50 (filed Apr. 1, 1996); Comments of New York State Department of Public Service, CS Docket No. 96-46, at 6 (filed Apr. 1, 1996). As Viacom advised in its original comments, however, a video service provider's decision to transform itself into an OVS operator should not be deemed grounds for abrogating private contracts, such as current licensing agreements between programmers and cable operators. Viacom Comments at 7, n.12.

¹⁷ Viacom Comments at 10 (citing Congressional policy underlying the 1996 Act's prohibition on telco/cable buy-outs and joint ventures).

¹⁸ Accord Joint LEC Comments at 15-16; U S WEST Comments at 12-13.

¹⁹ The same rule should apply where a cable operator opts to proceed under the OVS rules and the local LEC attempts to become a packager on that OVS facility.

IV. The Record Supports Granting OVS Operators Limited Discretion In Structuring Carriage Rates, Terms, And Conditions That Do Not Discriminate In Favor Of The OVS-Affiliated Packager

The record supports Viacom's call for allowing OVS operators limited discretion in establishing rates, terms, and conditions for carriage on Open Video Systems. Specifically, Viacom reiterates its support for an approach, suggested in the Notice, that would require an OVS operator to apply to unaffiliated program packagers the same rate structure that it offers (or could be fairly imputed) to its OVS-affiliated packager.²⁰ For example, a distinction between the rates charged for analog and digital capacity would not be justified to the extent such a distinction was unfairly employed to effectively reserve analog capacity to an affiliated (or other favored) packager and to relegate disfavored packagers to less desirable digital channels.²¹

V. The Record Strongly Confirms The Primacy Of Programmers' Control Over Licensing In The Structuring Of Channel Sharing And Other OVS Licensing Arrangements

The record compellingly supports the Commission's proposed predicate for OVS channel sharing: any program packager who wants to offer a program service carried on a shared channel "must first obtain permission from the program service to do so."²²

²⁰ As Viacom and others have made plain, any FCC-required disclosure of the carriage rates OVS operators charge packagers need not, and should not, spill into the separate domain of licensing agreements between OVS packagers and individual programmers. See, e.g., Viacom Comments at 14; HBO Comments at 22.

²¹ Cf. HBO Comments at 20-21.

²² Notice at ¶ 41. See, e.g., HBO Comments at 23-24; MPAA Comments at 6-7.

Accordingly, the Commission should expressly reject any suggestion that an OVS operator may have broader authority to deny programmers any rights they may otherwise have "to license or not license" their program services to one or more packagers.²³

Neither channel sharing nor any other elements of the OVS operator's "network administrator" role should be leveraged to advance the OVS-affiliated packager's efforts to extract an unreasonable license for an unaffiliated program service -- either directly from the programmer or through a competing packager that the programmer has licensed. Thus, the Commission must reject the suggestion that an OVS operator may deny unaffiliated packagers carriage where such packagers are licensed to carry program services for which the OVS-affiliated packager (or any other packager) has not obtained a license on terms to its liking.²⁴ Not only does this suggestion lack any statutory basis, but it would also flout the Act's prohibition against discrimination in favor of affiliated packagers and would undermine packager differentiation that would well serve the consumer's interest and the quest for intra-system competition.

The record also contains other explicit or implicit suggestions regarding application of program access rules to Open Video Systems that likewise lack any statutory basis and, indeed, contravene the specific limits of the express statutory authority for program access rules.²⁵ In particular, there is no statutory authority whatsoever for extending program

²³ Notice at ¶ 41.

²⁴ See NYNEX Comments at 12.

²⁵ See, e.g., NYNEX Comments at 21.

access rules to apply either, first, to terrestrially-delivered program services or, second, to any program service in which an OVS packager that is neither a LEC nor a cable operator has an interest.

VI. The Record Demonstrates That Non-Discriminatory Navigational Devices Are Critical To Supporting Intra-System Competition On Open Video Systems

Commenters have shown that OVS menus and navigational devices must function in a non-discriminatory manner if the service is ever to deliver on its promise for genuine intra-system competition.²⁶ The Commission's OVS safeguards should thus ensure a non-discriminatory interface between the subscriber and all packagers offering program services on the Open Video System, permitting subscribers to access both affiliated and unaffiliated program packagers with comparable ease.²⁷

The 1996 Act's clear mandate in this regard cannot be reconciled with the suggestion of some commenters that an OVS operator may circumvent its non-discrimination obligation by simply offering subscribers a navigational device that works only within the operator's affiliated package. The Commission need not preclude an OVS operator's reasonable discretion in arranging the presentation of the programming choices carried within its affiliated package. Congress was explicit, however, in prohibiting the OVS operator from

²⁶ See, e.g., HBO Comments at 13-16; MPAA Comments at 5-6.

²⁷ See HBO Comments at 14-16.

excluding unaffiliated packagers from any navigational device the operator employs with its system.²⁸

CONCLUSION

Viacom respectfully urges the Commission to adopt the foregoing proposals so that unaffiliated program packagers can enjoy fair access to, and non-discriminatory treatment on, OVS facilities, while LECs enjoy sufficient flexibility to create and design Open Video Systems that can vigorously compete in the marketplace.

Respectfully submitted,

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²⁸ Viacom explained previously how the Act's OVS framework clearly reflects a congressional vision of a single set-top box (if any) or, at a minimum, the absence of any technological obstacle to OVS subscribers gaining access to all packagers' offerings on an OVS system. See Viacom at 17. At the same time, Viacom concurs with other commenters' concern that OVS operators not be allowed freely to remove or otherwise alter information carried in the vertical blanking interval of a broadcast signal that might be used for navigational devices that subscribers acquire independently. See Comments of the National Association of Broadcasters, CS Docket No. 96-46, at 15 (filed Apr. 1, 1996).

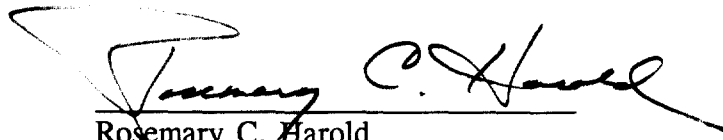
CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of April, 1996, I caused copies of the foregoing
"Reply Comments of Viacom Inc." to be hand-delivered to the following:

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